Teoh Tian Lai v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P–09–14 OF 1996
GOPAL SRI RAM, MOKHTAR SIDIN AND ABDUL KADIR SULAIMAN JJCA
28 NOVEMBER 2000

Criminal Procedure *— Appeal — Right of — Order directing defence to be called — Whether appealable — Criminal Procedure Code s 305 — Courts of Judicature Act 1964 s 50(1)*

The appellant was charged with an offence under the second limb of s 304 of the Penal Code. The sessions court acquitted him at the close of the prosecution case. An appeal against that order to the High Court succeeded and defence was ordered to be called. The appellant returned to the sessions court and gave evidence in his defence. The sessions court judge considered only the defence and convicted the appellant. The appellant appealed, but his appeal was dismissed.

Held, allowing the appeal:

There has been a serious misdirection as the order of the court directing defence to be called was not a final order, and hence not appealable under s 305 of the Criminal Procedure Code or s 50(1) of the Courts of Judicature Act 1964 (see p 277E). The position since the amendment to s 3 of the Courts of Judicature Act 1964 was dealt with by this court in *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129 (see p 278A). It was held that upon the finding of a prima facie case against the accused, the accused is under an obligation to submit to the order of the judge to enter his defence. There is no authority to support the proposition that an order of a court calling upon the accused to enter his defence can be stayed so as to allow the accused to file an appeal against that order. This is because the decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights (see p 278A–C). In view of the principles enunciated in that case, the court was satisfied that the learned judge was entirely wrong in the views he expressed, warranting the interference of this court (lihat ms 278E).

[**Bahasa Malaysia summary**

Perayu dituduh melakukan satu kesalahan di bawah cabang kedua s 304 Kanun Keseksaan. Mahkamah sesyen telah membebaskan beliau semasa kes pihak pendakwa selesai. Rayuan terhadap perintah tersebut kepada Mahkamah Tinggi telah berjaya dan pembelaan telah diperintahkan untuk dipanggil. Perayu kembali ke mahkamah sesyen dan memberi keterangan di dalam pembelaan beliau. Hakim mahkamah sesyen telah hanya mempertimbangkan pembelaan

tersebut dan perayu disabitkan. Perayu telah merayu, tetapi rayuan beliau telah ditolak.

Diputuskan, membenarkan rayuan tersebut:

Wujud satu salah arah yang serius kerana perintah mahkamah yang mengarahkan pembelaan dipanggil bukan satu perintah muktamad, dan justeru itu tidak boleh dirayu di bawah s 305 Kanun Keseksaan atau s 50(1) Akta Mahkamah Kehakiman 1964 (lihat ms 277E). Kedudukan sejak pindaan s 3 Akta Mahkamah Kehakiman 1964 telah dibincangkan oleh mahkamah ini dalam *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129 (lihat ms 278A). Adalah diputuskan bahawa dengan penemuan satu kes prima facie terhadap tertuduh, tertuduh adalah di bawah satu obligasi untuk menurut perintah hakim untuk memasukkan pembelaan beliau. Tiada autoriti bagi menyokong kenyataan bahawa perintah mahkamah yang memanggil tertuduh untuk memasukkan pembelaan beliau boleh digantung agar membolehkan tertuduh memfailkan satu rayuan terhadap perintah tersebut. Ini adalah kerana keputusan Mahkamah Tinggi di dalam memerintahkan pemohon-pemohon untuk memasukkan pembelaan mereka adalah satu keputusan yang tidak mempunyai kesan yang akhirnya menghapuskan hak mereka (lihat ms 278A–C). Dengan mengambilkira prinsip-prinsip yang disebut dengan terang di dalam kes tersebut, mahkamah berpuas hati bahawa hakim yang arif telah khilaf sama sekali di dalam pandangan yang dinyatakan oleh beliau, yang mewarankan campur tangan mahkamah ini (lihat ms 278E).]

Notes

For cases on right of appeal, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 419–478.

Cases referred to

Gng Eng Hwoo v R [1954] MLJ 256 (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129 (folld)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 50(1)
Criminal Procedure Code s 305
Dangerous Drugs Ordinance ss 30(2), (7)
Penal Code ss 304
Straits Settlement Criminal Procedure Code s 296

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Abdul Karim bin Abdul Jalil (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA. (delivering oral judgment): The main ground in support of this appeal, with which we are in agreement, relates to the approach taken by the learned intermediate appellate judge in the present case.

The appellant was charged with an offence under the second limb of s 304 of the Penal Code. The sessions court acquitted him at the close of the prosecution case. An appeal against that order to the High Court succeeded and defence was ordered to be called. The appellant returned to the sessions court and gave evidence in his defence.

The learned sessions judge, without undertaking a review of the prosecution case, considered only the defence and convicted the appellant. Being dissatisfied, the appellant appealed. In dismissing his appeal, this is what Jeffrey Tan J said:

> This is the appellant's appeal, in form, against his conviction and sentence. In substance, this appeal is against the trial court's rejection of his defence, as the appellant having not appealed against the order of the High Court (not this Court) — allowing the public prosecutor's appeal against the trial court's acquittal of the appellant without calling for the defence — ordering him to enter his defence to a charge under s 304 (second limb) of the Penal Code accepted that his defence was rightly called, and should have lodged an appeal against the order of the High Court, in view of appellant counsel's submission in the instant appeal that the prosecution had not made out a case, if he was so dissatisfied that the prosecution had not made out a case against him.

This, in my judgment, is a serious misdirection as the order of the Court directing defence to be called was not a final order, and hence not appealable under s 305 of the Criminal Procedure Code or s 50(1) of the Courts of Judicature Act 1964.

The point was considered by Whitton J in *Gng Eng Hwoo v R* [1954] MLJ 256, where, when considering the equipollent s 296 of the Straits Settlement Criminal Procedure Code, the following observations were made:

> It is clear then, no appeal can lie unless the magistrate in, to quote his own words, finding Tay Koon Tien was the owner as defined in s 30(7) at the material time, made an order within the meaning of s 296. I have been unable to find any definition of the word 'order' which appears to fit its use in this section, but my research into the matter has led me to the conclusion that in connection with a criminal cause or matter the word is confined, broadly speaking, to those decisions of a Court which affect parties to the proceedings in respect of their person or property. Now, in holding Tay Koon Tien to be the owner of the boat, the learned magistrate did not, in my view, make anything in the nature of a conclusive order in relation to the boat. Had the case proceeded to a normal end, the magistrate then made an order of forfeiture, it would be open to the appellant to appeal as a person coming within the scope of s 30(2). But in such circumstances were the magistrate does not make an order for forfeiture, I do not think for one moment it could be successfully maintained that the magistrate's ruling as to ownership based on the highly artificial meaning given to the word 'owner' in s 30(7) of the Dangerous Drugs Ordinance, had affected the legal title in the vessel which existed before the proceedings were instituted in the magistrate's court.

The position since the amendment to s 3 of the Courts of Judicature Act 1964, was dealt with by this Court in *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129. I find it sufficient to quote from the headnote of the case:

(1) If at the end of the prosecution case, the court finds that there is a prima facie case against the accused, the court has no other option but to call upon the accused to enter on his defence. The accused will then be under an obligation to submit to the order of the judge by making his defence in any way in accordance with the provisions of the law. There is no room for the accused to avoid the issue of presenting his case; he must comply. Further, there is no authority to support the proposition that an order of a court calling upon the accused to enter his defence can be stayed so as to allow the accused to file an appeal against that order on the ground that the finding of the court was grossly wrong in law and in fact;

(2) The decision of the High Court in ordering the applicants to enter their defence was a ruling that did not have the effect of finally disposing of their rights. At the stage of making the order, it had no finality in its intent. This would only happen after a decision had been made at the close of the defence. Only then will there be a decision to 'affect the event of the appeal'; *Au King Chor & Ors v PP* [1985] 1 MLJ 216 distinguished.

In view of these principles, we are satisfied the learned judge was entirely wrong in the views he expressed. His decision had occasioned a serious miscarriage of justice, warranting the interference of this court. Therefore, we allow the appeal, quash the conviction and set aside the sentence. All other ancillary orders are rescinded and the accused is set at liberty.

Appeal dismissed.

Reported by Wong Ee Lynn